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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE NATIONAL ABORTION FEDERATION, AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE NATIONAL ABORTION FEDERATION, AND PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The American College of Obstetricians and Gynecologists (ACOG), the National Abortion Federation (NAF), and Planned Parenthood Federation of America, Inc. (PPFA) submit this brief in support of Respondents.[1]

ACOG, founded in 1951, is a private, voluntary, not-for-profit organization of physicians who specialize in obstetric and gynecologic care. A leading group of pro-

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[1] The parties have consented to the filing of this brief, and their letters of consent are filed concurrently herewith.

fessionals providing health care to women, its more than 37,000 members represent approximately 90 percent of all obstetricians and gynecologists practicing in the United States.

NAF, a not-for-profit professional association, was founded in 1977 and is composed primarily of clinics and physicians' offices providing reproductive health services, including abortion. Currently, NAF members include over 300 abortion providers operating in 42 states, the District of Columbia, Puerto Rico, and Canada. NAF provides professional standards, guidelines, training, and education to its members and serves as a clearinghouse for information and advice to abortion service professionals and the general public.

PPFA, a not-for-profit corporation organized in 1922, is the leading national voluntary health organization in the field of family planning. Currently, PPFA has 152 affiliates in 49 states operating approximately 925 health centers. PPFA affiliates offer a wide range of services relating to reproductive health, including abortion.

Amici, whose members and affiliates provide abortions and other medical treatment, have a strong and abiding interest that this Court be fully aware of the profoundly harmful consequences for medical patients and the provision of medical care that result from antiabortion harassment and intimidation outside of abortion clinics and other medical facilities. *Amici* themselves have obtained, and will continue in the future to seek, injunctive relief similar to that at issue in this case in an effort to lessen the often devastating impact of the protesters' conduct upon abortion and non-abortion patients alike, and upon the providers' ability to render care.

STATEMENT OF FACTS

Amici adopt the Statement of the Case in the Brief for Respondents filed in this Court.

SUMMARY OF ARGUMENT

In this case, as in myriad documented cases throughout the country, women seeking medical care, physicians providing that care, and staff at clinics and other medical facilities all have been the targets of extreme forms of antiabortion harassment and intimidation outside those buildings. This conduct of the protesters is wholly inimical to the provision of medical care. By crowding in extremely close proximity to women entering the facilities, and by shoving, pushing, gesticulating hysterically, and screaming angrily at such close range, the protesters jeopardize the health of the women seeking medical care, heighten their risks of suffering from medical complications, and place great stress upon medical providers, thereby impairing their ability to function optimally. The protesters' conduct harms not only abortion patients in this way, but also many non-abortion patients seeking reproductive health, obstetric, or other medical treatment.

Amici are dismayed at the utter absence from the Brief for Petitioners of any discussion of the medical consequences of the protesters' activities. Indeed, Petitioners evidently would have this Court treat the Respondent medical facilities as any "business facilit[ies]." Brief for Petitioners at 14. *Amici* sharply challenge this view, and instead argue that the health care dimensions of this case present a significant government interest which requires protections that would be unnecessary in other First Amendment cases involving different kinds of "business facilities."

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2525 (1994), this Court held that in order to comport with the First Amendment, a content-neutral injunction that restricts speech should "burden no more speech than necessary to serve a significant government interest." The buffer zone and "cease and desist" provisions of the injunction at issue place essential controls upon the protesters' injurious conduct, while only minimally and inci-

dentally impacting upon their speech. The provisions are critically necessary to serve the significant government interest in protecting women's health and access to medical care. Therefore, they satisfy the *Madsen* test.

Nevertheless, *amici* further respectfully urge this Court to reconsider whether the heightened scrutiny enunciated in *Madsen* is appropriate in this and similar cases. Specifically, *amici* argue that at least with regard to the particular injunction provisions at issue herein (and others like them), a more lenient First Amendment analysis should be applied. The entire purpose and virtually the entire effect of these two provisions is to regulate the *conduct* of the protesters that impedes access to the medical facilities and crowds and threatens people seeking access there. This regulation of harmful conduct has only a minimal and incidental impact upon speech since the protesters may still engage in the fullest panoply of bona fide speech activities, including picketing, pamphleting, sidewalk counseling, chanting, waving signs and images, praying, and shouting. *Amici* submit that where, as here, certain provisions of an injunction regulate nonspeech with only minimal and incidental impact on expression, under this Court's precedents a more lenient First Amendment analysis should be applied. A more relaxed standard is also appropriate in this case because the patients targeted by the protesters constitute an audience held captive by virtue of their medical circumstances —another factor that has historically justified heightened restrictions on expression. Therefore, whatever the merits of applying a more stringent review to other provisions of this or other injunctions, the particular provisions at issue herein should be tested more leniently.

ARGUMENT

I. THE PROVISIONS OF THE INJUNCTION AT ISSUE SATISFY THE *MADSEN* TEST BECAUSE THEY ARE NECESSARY TO SERVE THE SIGNIFICANT GOVERNMENT INTEREST IN RESTRICTING CONDUCT THAT HARMS PATIENTS AND IMPEDES THE PROVISION OF SAFE AND EFFECTIVE MEDICAL CARE

In *Madsen*, this Court approved the Florida Supreme Court's enunciation of several of the "significant government interests" sufficient to justify injunctive regulation. One of these significant government interests is the protection of "a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy." *Madsen*, 114 S. Ct. at 2526. Another, albeit related, significant government interest is the protection of medical patients from the harms of targeted picketing: "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." *Id.* The provisions of the injunction at issue in this case, which burden speech only minimally and incidentally to their regulation of conduct (*see* discussion *infra* at 23-25), are absolutely necessary to serve these significant government interests.[2] Therefore, they satisfy the *Madsen* test.

The protesters' conduct in this case is fundamentally similar to that which has been documented in many other cases around the nation. It involves, as the district court found, hostile protesters crowding in large numbers in

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[2] Indeed, in crafting this injunction, the district court was "guided by the paramount need to maintain an atmosphere conducive to the health care functions" of the Respondent medical facilities. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1433 (W.D.N.Y. 1992), *aff'd en banc as modified sub nom. Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (Pet. App. A-168) ("Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari, filed December 27, 1995).

close proximity to clinic entrances, patients, and driveway entrances, swarming around cars and people trying to get into the facilities, and forcing patients to run an intimidating gauntlet of harassing, shoving, grabbing, crowding, and threatening conduct. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992) (Pet. App. A-146 to A-147). Protesters push video cameras right up into the patients' faces, intending to, and succeeding in, terrifying them. *Id.* at 1426 (Pet. App. A-151). Also, the so-called "sidewalk counselors" often "turn to harassing, badgering, intimidating and yelling. . . . [They] often crowd around patients, invade their personal space and raise their voices to a loud and disturbing level." *Id.* at 1425 (Pet. App. A-148).

This type of conduct increases medical risks and causes harm not only to abortion patients but to many other patients as well. Like most abortion facilities, Respondent medical facilities and physicians all provide a full range of gynecological and family-planning health care services in addition to abortions. For example, Respondent Dr. Morris Wortman testified at the preliminary injunction trial that on Saturdays, when antiabortion conduct was expected at his medical office, at least 60 percent of his patients were non-abortion patients. Tr. 899.[3] Moreover, several of the Respondent medical facilities and physicians' offices are located in or next to full-service hospitals, or in medical office buildings that house numerous health care providers. The protesters thus disrupt the provision of many types of medical care, including obstetric care, nongynecologic surgery, and many other types of general medical care.[4]

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[3] Citations to the preliminary injunction trial transcript are designated herein as "Tr."

[4] In a 1989 study of nonhospital abortion facilities, 94% provided contraceptive care, 91% provided general gynecologic care, 88% provided sexually transmitted disease treatment, 64% provided infertility services, 60% provided HIV testing, 51% provided obstetric care, 45% provided general medical care, and 24% provided nongynecologic surgery to non-abortion patients. Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plan. Persp. 246, 247 Table 1 (1991).

Under ordinary conditions, an abortion is an extremely safe medical procedure.[5] Nevertheless, all medical procedures, particularly invasive procedures such as abortions, involve certain risks. An abortion carries with it a potential for serious complications,[6] including infections necessitating hospitalization, hemorrhage requiring transfusion, uterine perforation, bowel or bladder injury, pulmonary embolism, endotoxic shock, convulsions, cardiac arrest, and, in rare circumstances, death.[7] In addition, virtually all of the procedures performed on non-abortion patients by Respondents and neighboring providers carry a variety of medical risks as well, ranging from relatively minor risks to very serious, life-threatening ones. *See, e.g., Be Informed: Questions To Ask Your Doctor Before You Have Surgery*, U.S. Department of Health and Human Services, Agency for Health Care Policy and Research, Pub. No. 95-0027, Jan. 1995, at 1 (all surgeries and alternative treatments carry risks).

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[5] A first-trimester abortion is safer than childbirth. *See, e.g., Safety of Abortion*, Fact Sheet, National Abortion Federation (1996).

[6] A 1985 article estimated that 5,000 women suffer a serious complication from abortions each year. *See* James W. Buehler, M.D. et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. & Gynec. 14, 14 (1985).

[7] Nancy J. Binkin, *Trends in Induced Legal Abortion, Morbidity and Mortality*, 13 Clin. Obstet. & Gynaec. 83, 92 (1986); Willard Cates, Jr. et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 267 n.† (1977); David A. Grimes, M.D. et al., *Prevention of Uterine Perforation During Curettage Abortion*, 251 JAMA 2108 (1984); *see also Safety of Abortion*, Fact Sheet, National Abortion Federation (1996).

For the reasons described below, the antiabortion conduct at issue increases the risk of these complications occurring; it could also result in the enhanced severity of any such complications. The protesters' conduct likewise substantially impairs the ability of doctors and other staff to provide effective services, and creates an array of other potentially serious risks to all women seeking medical services at these facilities.[8]

A. The Protesters' Conduct Harms Patients By Causing Them To Delay Seeking Treatment And Follow-Up Care

In many cases, the conduct of the protesters so terrifies and intimidates patients that it deters them from entering the medical facilities on the days of their appointments, thereby forcing them to postpone or altogether abandon their abortions or other medical care. *See, e.g., Pro-Choice Network*, 799 F. Supp. at 1424, 1427 (Pet. App. A-147, A-153 to A-154).[9] By causing this delay, the protesters place abortion patients and others at greater risk of suffering the kinds of complications described above. With respect to abortions, it is widely recognized that "[t]he earlier in gestation that a woman has an abortion, the safer it is for her medically. . . . The risk of the procedure and the potential for complications increase with the length of pregnancy." *Medical and Psychological Effects of Abortion on Women*, Final Draft of Surgeon General's Report 13 (1989). Indeed, studies indicate "that *any* delay increases the risk of complications." Willard Cates, Jr. et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 268 (1977) (emphasis in original).[10]

Likewise, delay in seeking treatment is highly likely to be harmful to many non-abortion patients as well. For example, "[a] postponed pap smear or breast examination can result in delayed detection of pre-cancerous cells or a lump causing serious and unnecessary health risks to the patient." *Violence at Women's Health Clinics: Hearing Before Subcomm. on Labor, Health and Human Services, and Education, and Related Agencies of the Senate Comm. on Appropriations*, 104th Cong., 1st Sess. (1995) (here-

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[8] *Amici* note that the protesters specifically intend to bring about these medical consequences. *See, e.g.*, Joseph M. Scheidler, *Closed: 99 Ways to Stop Abortion* 74, 76 (1985):

> [I]t is important for us to know that when pro-life pickets are outside a clinic, complications and confusion inside the clinic increase by as much as 400 percent. . . .
>
> . . . .
>
> Consider that if our presence at clinics causes four times more confusion and complications than there would be if we were not there, then it is obvious that we should be there every time they operate. . . .
>
> . . . The only way to avoid complications is to avoid abortions.

See also Violence at Women's Health Clinics: Hearing Before Subcomm. on Labor, Health and Human Services, and Education, and Related Agencies of the Senate Comm. on Appropriations, 104th Cong., 1st Sess. (1995) (hereinafter "*Specter Hearing*"), at 74 (statements of Kay Arndorfer, Acting Executive Director, and Donna L. Singletary, Director, Government Relations, National Abortion Federation), 76-81 (discussing excerpts from *The Army of God Manual* put out by an antiabortion underground group as a how-to manual for disrupting abortions).

[9] *See also Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 668-69 (Fla. 1993) (per curiam), *aff'd in part and rev'd in part sub nom. Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991).

[10] *See also* James W. Buehler, M.D. et al., *supra* note 6, at 14 ("advanced gestational age is recognized as a major risk factor for serious complications following abortion"); Janet O'Keeffe & James M. Jones, *Easing Restrictions on Minors' Abortion Rights*, 7 Issues in Science & Tech. 74, 79 (1990) ("Any delay in having an abortion increases the risks to a woman's health . . . ."); Jocelyn A. Handy, *Psychological and Social Aspects of Induced Abortion*, 21 Brit. J. Clin. Psychol. 29, 37 (1982) ("medical complications increase with gestation").

inafter "*Specter Hearing*"), at 57 (statement of Kate Michelman, President, National Abortion and Reproductive Rights Action League); *see also* testimony of Marilynn Buckham, Tr. 507-08 (protesters caused increased problems for asthmatic patient).

The protesters' conduct also causes patients who do succeed in entering the facilities on the days of their appointments to delay or even avoid altogether their follow-up appointments. *See, e.g.*, testimony of Dr. Wortman, Tr. 901-02. Forgoing or delaying post-procedure follow-up appointments enhances the risk of complications. *See, e.g., Abortion and Sterilization: Medical and Social Aspects* 267 (Jane E. Hodgson ed., 1981) ("post-abortion complications and unnecessary laparotomies could be avoided with better follow-up care"). As the district court found, one of the most disturbing examples of this phenomenon has occurred when abortion patients who have undergone insertion of a cervical dilation device known as a laminaria fail to return to the clinic to have it removed within the medically required time, thereby risking serious infection, sterility, hemorrhage, or emergency hospitalization. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-153); *see also* testimony of Susan Ward, Tr. 612-13; *NOW v. Operation Rescue*, 747 F. Supp. 760, 764 (D.D.C. 1990), *aff'd in part, remanded in part*, 37 F.3d 646 (D.C. Cir. 1994).

B. The Protesters' Conduct Causes Patients To Suffer From Extreme Stress, Which In Turn Increases Medical Risks

The record in this and other cases, along with medical and social scientific literature, demonstrates that the conduct at issue often causes patients to suffer extreme emotional and psychological stress, which in turn can complicate procedures and increase risks. Indeed, it is generally accepted that in the medical context there is a particular

need for calm and quiet, and that harassment and stress are inimical to the provision of medical care:

> " 'Hospitals, after all are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.' "

Madsen, 114 S. Ct. at 2528 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783-84 (1979), and *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment)).

The increased stress and anxiety inflicted upon patients by the protesters' conduct can hardly be overstated. Patients who are forced to experience it usually are "visibly shaken and severely distressed"; the use of video cameras at close range often makes them "hysterical or severely upset." *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-152 to A-153). Not only do they exhibit the expected reactions such as demonstrable fright and crying, they also exhibit "evidence of adrenergic 'fight-or-flight' reaction such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention." Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations*, 12 Population and Environment 379, 380 (1991) (hereinafter "*Proxemics*").[11]

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[11] *See also American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 613 F. Supp. 656, 663 (E.D. Pa. 1985) (patients entering clinic during protest "were visibly upset and distressed"); Jacqueline D. Forrest & Stanley K. Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plan. Persp. 9, 13 (1987) (for women who encounter harassing protests, "obtaining an abortion can be a frightening experience"); Barbara Radford & Gina Shaw, *Antiabortion Violence: Causes and Effects*,

Social science literature confirms that the invasion of personal space creates stress and, indeed, that the level of stress is directly proportionate to the distance between people:

> "A close interpersonal approach by a stranger in a public setting is stressful. Interpersonal space is something that we need in order to protect ourselves. . . .
>
> As people approach more closely, . . . [there is] increased eye contact . . . [one is] able to see facial expressions. . . . [One is] able to detect the possibility of aggressive posturing. At close interpersonal distances, the effect [is] magnified. [The] stress reaction is proportionate. . . . [A]s distance lessens between people, stress increases."

Proxemics at 384 (citation omitted). Indeed, the research literature consistently demonstrates that when strangers intrude on personal boundaries, "discomfort, physiological arousal, [and] flight reactions" occur; "the closer a stranger . . . comes, the more uncomfortable the situation." Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding* 93 (1975).[12] In the health care context, an adequate distance between people is particularly important in protecting patients:

> "Health and medical [problems] are matters that most Americans would describe as being . . . of great privacy. Even in medical schools, nurses, doctors,

3 Women's Health Inst. 144, 149 (1993) (hereinafter "Radford & Shaw") ("militant antiabortion activism . . . has caused untold trauma").

[12] *See also* Rhonda Frankel-Fein, *Defense Style, Social Support Appraisal, Response to a Counseling Session, and Stress Perception in Women Undergoing Abortion* 3 (1991) (Ph.D. dissertation, New York University) (feeling threatened increases an individual's anxiety level, which can include physiological reaction) (citing E.S. Katkin, *Relationship Between Manifest Anxiety and Two Indices of Autonomic Response to Stress*, 2 J. Personality & Social Psychol. (1965)).

> and interns are instructed in order to be more sensitive to the distance adopted [in providing health care]."

Proxemics at 385 (citation omitted); *see also* testimony of Dr. Alice Hoagland, an expert in behavioral medicine and social impact theory, Tr. 739-41, 743-45, 748-51 (an unwanted, threatening stranger who approaches a patient seeking medical care causes numerous physiological stress reactions).

The level of heightened stress caused by the protesters' conduct is particularly problematic in this context because it is imposed upon patients who are already undergoing the pre-existing stress of an unwanted pregnancy or other medical problem, and impending treatment or surgery. *See, e.g., Pro-Choice Network*, 799 F. Supp. at 1427, 1428 (Pet. App. A-152, A-156). Even under the best of circumstances, abortions, along with other gynecological procedures, often evoke considerable anxiety. *See, e.g.*, Marianne Quinn, *Decision Making By Single Women Seeking Abortion*, 8 J. Nurses Soc'y of NZ 4, 5 (1980) (ordinary factors that cause stress in women seeking an abortion include visiting doctors and getting to the clinic, financial matters, and difficulties associated with confiding in others). The termination of an unwanted pregnancy in particular is known to be an especially stressful life event.[13] Many women approach abortion, like any other

[13] *E.g.*, Nancy E. Adler et al., *Psychological Factors in Abortion*, Am. Psychologist 1194, 1197 (Oct. 1992); Uta Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. & Gynaec. 33, 36 (1986); Rhonda Frankel-Fein, *supra* note 12, at 4; Glenda C. Polk-Walker, *Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion*, 28 Nursing Forum 22, 22 (1993); Marianne Quinn, *Decision Making By Single Women Seeking Abortion*, 8 J. Nurses Soc'y of NZ 4, 5 (1980); Tomas J. Silber, M.D., *Ethical and Legal Issues Relating to Abortion in Adolescence*, 18 Pediatric Annals 231 (1989); Margaret Cotroneo & Barbara R. Krasner, *A Study of Abortion and Problems in Decision-Making*, J. Marriage & Fam. Counseling 69, 70 (Jan. 1977).

invasive procedure, with trepidation because it "is a medical procedure which may be uncomfortable or painful." Uta Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. & Gynaec. 33, 36 (1986).[14] In addition, for most patients in general, even a minor surgical procedure can be "an important problem of emotional stress." Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688, 694 (1987). For most patients, the mere prospect of administration of anesthesia is associated with an increase in stress. *See, e.g.*, Joseph M. Garfield, M.D., *Psychologic Problems in Anesthesia*, 10 Am. Fam. Physician 60, 62 (1974).

Exacerbated enormously by direct exposure to anti-abortion harassment, these heightened anxieties can, in turn, cause any of a number of serious health problems for patients. Agitation can lead to major complications that would otherwise be extremely unlikely. *Proxemics* at 381. Stress and anxiety can cause elevated blood pressure and hyperventilation. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-152). They can also cause aggravation of asthmatic or morning sickness conditions. Hyperventilation may lead to "muscle spasms, circumoral numbness, and numbness and tingling of the fingers" and may "even lead to loss of consciousness" under certain circumstances. *Proxemics* at 381. Urinary retention brought on by stress can make it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in pre-operative evaluations. *Id.* at 380-81. Patients under extreme stress generally show more resistance to analgesics and require sedation, or

[14] *See also* Jocelyn A. Handy, *supra* note 10, at 37; Nancy Wells, *Pain and Distress During Abortion*, 12 Health Care for Women Int'l 293, 301 (1991) ("first-trimester abortion was related to a significant level of pain").

higher than usual doses of sedation, which increase surgical risks.[15]

Some patients are so distressed by the protesters' conduct that they are unable to lie still on the operating table, causing obvious risks and possibly making performance of the procedure impossible. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-153). Indeed, one of the main dangers described by witnesses at the preliminary injunction trial is that agitated patients tend to thrash around on the operating table, causing a risk that the sharp instruments used during the medical procedures may cause perforations. *See, e.g.*, Tr. 506-08 (patients agitated and unable to relax because of the demonstrators, increasing risk of danger from sharp instruments); Tr. 615-16 (danger of harm from instruments if patients move around); Tr. 821 (patients' thrashing increases risks).

Stress generally increases the level of pain experienced and the difficulty of performing any medical procedure.[16] In one study, patients suffering from greater stress before an elective inguinal hernia repair operation—a relatively standard surgical procedure—experienced more complica-

[15] *See* Warren M. Hern, *Abortion Practice* 35-37 (1984) (general anesthesia is associated with a two- to four-fold increase in first-trimester abortion fatalities, and significant increases in uterine perforation, cervical injury, blood transfusions, cervieal suture, and corrective major surgery); Fritz-Ulrich Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688, 688 (1987) (in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anesthesia, "[i]mportant factors are fear, anxiety and stress").

[16] *E.g.*, Robin C. Kay, *Psychological Preparation for a Potentially Stressful Medical Procedure* 32 (1984) (Ph.D. dissertation, Fordham University); Fredric M. Levine et al., *Failure Hurts: The Effects of Stress Due to Difficult Tasks and Failure Feedback on Pain Report*, 54 Pain 335, 336 (1993); Anne Manyande et al., *Anxiety and Endocrine Responses to Surgery: Paradoxical Effects of Preoperative Relaxation Training*, 54 Psychosomatic Medicine 275, 283 (1992).

tions following surgery, had poorer surgical outcomes, and used three times or more the amount of narcotics following surgery than did other patients.[17] There also were some indications in this study that the stressed patients were more susceptible to infectious diseases and needed a greater recovery period from these infections.[18]

C. The Protesters' Conduct Causes Physicians And Other Medical Staff To Suffer Stress Which Impairs Their Ability To Provide Care

Physicians and other medical staff are also affected by the protesters' conduct, ultimately to the patients' detriment. Employee levels of distress are highly correlated with protest activity. *See, e.g.*, Glenna Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion Facilities Are Coping with Antiabortion Harassment* (1990) (Ph.D. dissertation, The Fielding Institute) (study investigating abortion clinic workers' methods for coping with stress associated with antiabortion harassment); Tr. 518.[19] The most obvious and dramatic result of this stress occurs when physicians are forced out of practice and staff leave their positions of employment. *See, e.g.*, Tr. 520-23.[20] However, even

[17] Bernard S. Linn, M.D. et al., *Effects of Psychophysical Stress on Surgical Outcome*, 50 Psychosomatic Medicine 230 (1988).

[18] *Id.* at 241.

[19] *See also* Radford & Shaw, *supra* note 11, at 148 (" 'Employees of facilities subjected to extreme levels of antiabortion activity were likely to feel violated and vulnerable, to experience a sense of disruption in their daily lives, and to have their confidence in the community undermined'. . . .") (citation omitted).

[20] *See also* Jacqueline D. Forrest & Stanley K. Henshaw, *Providing Controversial Health Care: Abortion Services Since 1973*, 3 Women's Health Inst. 152, 155 (1993) ("Since 1988, harassment by antiabortion activists may have become a more prominent reason for physicians and other health care providers to avoid performing abortions."); Radford & Shaw, *supra* note 11, at 148-49 (quoting Dr. Curtis Boyd: " 'When I walk to work through a hostile crowd

when a medical practice continues in operation, these adverse effects on health care providers ultimately have a negative effect on patient welfare. The district court found that the stress "causes the staff to be distracted and makes it difficult for them to maintain the calm environment necessary for treating patients." *Pro-Choice Network*, 799 F. Supp. at 1428 (Pet. App. A-156); *see also* Erica Bates, *Doctors and Their Spouses Speak: Stress in Medical Practice*, Sociology of Health and Illness, Vol. 4 No. 1, 25, 25 (1982) (the stress the doctor feels may contribute significantly to problems in the doctor-patient relationship); *Feminist Women's Health Center v. Blythe*, 39 Cal. Rptr. 2d 189, 196 (Cal. Ct. App.) (increased anxiety of clinical staff brought on by antiabortion activities increases the risks to patients because the abortion procedure requires a great deal of concentration), *cert. denied*, 116 S. Ct. 514 (1995); John W. Ely, M.D. et al., *Perceived Causes of Family Physicians' Errors*, 40 J. Fam. Prac. 337, 340 Table 2 (1995) (finding in a study of errors of family physicians that 91% attributed errors to various causes of stress).

D. The Protesters' Conduct Prevents Many Non-Abortion Patients From Obtaining A Wide Panoply Of Basic Health Care Services And Reduces Available Services

As noted above, many of the medical services offered by reproductive health care clinics, including Respondent providers, are for preventive care and non-abortion reproductive health services. *See Specter Hearing* at 2 (statement of Sen. Arlen Specter, Chairman). However, protesters generally practice no selectivity in targeting

shouting "Murderer!" at me, I wonder how many other professionals would choose to provide a service that subjected them to such harassment.' "); *id.* at 149-50 (detailing the experience of a physician who ceased to perform abortions after picketers appeared outside his home with signs that said "Daddy Kills Little Boys and Girls").

patients and often act in ruthless disregard of a patient's medical condition. For example, the Washington State Supreme Court in *Bering v. SHARE*, 721 P.2d 918, 923 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987), noted:

> Respondent-physicians and a nurse testified that picketers interfered with ill patients, placing a pregnant woman possibly suffering from toxemia in acute medical danger, and delaying a patient who was miscarrying a wanted pregnancy and bleeding heavily. This last patient had to force her way through a group of picketers in order to reach her nurse and wheelchair.

See also Pro-Choice Network, 799 F. Supp. at 1425 (Pet. App. A-149) (sidewalk counselors target young women and out-of-state vehicles, but they cannot know for sure "whether a woman entering the clinic is even seeking an abortion").

For many minority low-income women and teens, family-planning facilities are their only source of some of their basic health care needs. Not only do these clinics offer a range of family planning services, such as pregnancy tests, contraception, and treatment for sexually transmitted infections; they also provide critical basic preventive health care services, such as screenings for breast and cervical cancer and hypertension and initial prenatal care services. *See, e.g., Specter Hearing* at 57 (statement of Kate Michelman) (health care services at these clinics include "family planning counselling, contraception, breast exams, pap smears, blood screening [and] pre-natal care"). Most of these clinics also conduct related programs, such as teen pregnancy prevention groups, community AIDS education, and outreach to schools. *Id.* at 31-32 (statement of Valerie Koscelnik, Coordinator, CHOICE Hotline); *accord id.* at 45-46 (statement of Pamela Maraldo, President, Planned Parenthood Federation of America); *id.* at 50 (statement of

Judith DeSarno, President, National Family Planning and Reproductive Health Association) (family planning clinics provide services to over 4 million women at over 4,000 sites across the United States). For the majority of women who receive family-planning services in such a clinic, that clinic is their *only* source of health care. *Id.* at 48-49 (statement of Pamela Maraldo).

However, when encountering the intimidating specter of face-to-face picketing and protest activity, many of these women will be deterred from seeking preventive and other necessary health care services. As Ms. Koscelnik indicated during the *Specter Hearing*:

> In far too many instances, [women's] access to these crucial services has been made difficult, or even impossible, because of intimidation, harassment and blockades by radical anti-abortion groups. We have talked to women who were verbally assaulted and threatened as they walk into clinics to fill birth control prescriptions. We have talked to women who have decided not to go to a nearby Planned Parenthood for family planning because they fear harassment and have heard stories about intimidating tactics of protesters. As a result, women's choices in seeking family planning and other health services are limited.

Id. at 33 (statement of Valerie Koscelnik).

Furthermore, the intensity of antichoice protest activities has diminished the range of health care services that these clinics are able to offer their patients. Over the past few years, such clinics have spent hundreds of thousands of dollars on security measures to minimize risks to clinic staff and patients—dollars which could have been spent on life-saving services such as pap smears and screening for hypertension and sexually transmitted diseases.[21] The

[21] "Another result of the concerted campaign of antiabortion harassment and violence is, quite expectedly, increased operating costs for facilities." Radford & Shaw, *supra* note 11, at 150.

tradeoff could not be clearer—for the money these clinics have spent on security, they could have offered additional services, opened new clinics, or served thousands of additional women at their current sites. *Specter Hearing* at 34 (statement of Jill June, President, Planned Parenthood of Greater Iowa); *accord id.* at 49 (statement of Pamela Maraldo) (instead of expanding urgently needed services, Planned Parenthood clinics have had to direct valuable health care resources on security measures). Anti-choice protest activity in immediate proximity to these health care clinics is effectively denying low-income women and adolescents access to necessary health care services. *See, e.g.*, David A. Grimes, M.D. et al., *An Epidemic of Antiabortion Violence in the United States*, 165 Am. J. Obstet. & Gynec. 1263, 1267 (1991) (costs of antiabortion epidemic may translate into higher fees for patients).

E. The Protesters' Conduct Causes A Variety Of Other Risks Of Harm To Patients

The protesters' conduct causes a variety of other potentially dangerous medical risks. For example, the presence of crowds of protesters in the driveways and streets in front of medical facilities may impede the arrival of emergency vehicles which may suddenly be called upon to assist in a given procedure. In the event of an emergency such as a uterine perforation[22] involving large blood loss, a patient's life could depend upon the prompt arrival of emergency vehicles. These crowds also raise risks of traffic accidents and attendant injuries to patients, physicians, and staff (not to mention to the protesters themselves). *See, e.g., Pro-Choice Network*, 799 F. Supp. at 1424 (Pet. App. A-147) ("The presence of numerous

[22] A uterine perforation, although an infrequent complication, may lead to infection, hemorrhage, and trauma to abdominal contents and increases the risk of abortion-related death due to infection by more than 100% and to hemorrhage by more than 1000%. David A. Grimes, M.D. et al., *supra* note 7, at 2108.

demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the [abortion clinic] facilities and creates a danger to both the occupants of the cars and the demonstrators themselves."); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402, 404 (Cal. 1995) (witness stated that picketing on sidewalk in front of clinic will probably cause traffic accidents), *cert. petition filed*, 64 U.S.L.W. 3287 (U.S. Oct. 10, 1995) (No. 95-576). In addition to traffic accidents, the hostile crowds and chaos created by the protesters also in many instances present physical danger to pedestrians, patients, and others, in and around the entrances to the facilities. *See Pro-Choice Network*, 799 F. Supp. at 1424 (Pet. App. A-147) (the loud and disruptive conduct of the protesters, including their insistence on crowding in driveways and right in front of entrances, "causes stress and sometimes even physical injury to the patients . . . and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care"); *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 672 (Fla. 1993) (per curiam) ("confrontations [with antiabortion protesters] place the patient's health and safety in jeopardy"), *aff'd in part and rev'd in part sub nom. Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

F. Numerous Courts Around The Country Have Recognized These Harmful Effects Of Antiabortion Conduct Upon Women's Health

In this case, the district court made uncontroverted findings about the increased health risks caused by the protesters' conduct. *Pro-Choice Network*, 799 F. Supp. at 1427 (Pet. App. A-152 to A-154). However, the trial court in this case was not alone. Indeed, such court findings of antiabortion interference with the provision of safe medical services are legion. *See, e.g., Madsen*, 114 S. Ct. at 2526 (citing the Florida Supreme Court's finding that the "targeted picketing of a hospital or clinic

threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance"); *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 649 (D.C. Cir. 1994) (antiabortion conduct causes risk of medical harm); *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989) (harm from delay and interference with vehicular traffic), *cert. denied*, 495 U.S. 947 (1990); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1346 (3d Cir.) (stress causes additional risks when going under or coming out of general anesthesia), *cert. denied*, 493 U.S. 901 (1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 683 (9th Cir. 1988) (stress and anxiety raise the risk of medical complications and sometimes lead to incomplete or inaccurate health history reports from patients soon after entering the clinic); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617, 620 (N.D. Cal. 1991) (stress and delays often require more advanced and more dangerous medical procedures); *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 613 F. Supp. 656, 666 (E.D. Pa. 1985) (the effect of verbal harassment on women entering and leaving clinics is "to increase the level of anxiety a woman feels and to exacerbate any emotional problems . . . which in turn may have an adverse effect on the medical procedure itself").

II. EVEN THOUGH THEY PASS THE *MADSEN* TEST, BECAUSE THE PROVISIONS AT ISSUE REGULATE NON-EXPRESSIVE CONDUCT AND ONLY INCIDENTALLY AND MINIMALLY AFFECT SPEECH, AND BECAUSE THEY ARE NECESSARY TO PROTECT THE HEALTH OF WOMEN HELD CAPTIVE BY MEDICAL CIRCUMSTANCE, A MORE LENIENT FIRST AMENDMENT ANALYSIS SHOULD BE APPLIED

Though the provisions of the injunction at issue satisfy the *Madsen* test, *amici* respectfully urge this Court to reconsider whether *Madsen*'s more stringent analysis should in fact be applied to these and similar provisions, and argue that a more lenient test should instead be applied. These provisions were carefully crafted in order to put vitally needed limits on the harmful, non-expressive conduct of the protesters while only minimally infringing on their free speech rights. The district court expressly held that the buffer zone was necessary to ensure access to medical care and to prevent the crowding and invasion of personal space caused by the protesters' conduct. *Pro-Choice Network*, 799 F. Supp. at 1434 (Pet. App. A-170). The court also held that, at the same time, the cease and desist provision was intended to "accommodate fully defendants' First Amendment rights." *Id.*

The crowding of a group of hostile and intimidating protesters in very close, threatening proximity to a medical patient is in itself neither speech nor a method of communicating. *See Madsen*, 114 S. Ct. at 2532 (Stevens, J., dissenting in part) (describing injunction's 300-foot buffer zone as prohibiting "a species of conduct," to wit, accompanying, encircling, surrounding, harassing, threatening, or physically or verbally abusing patients). This conduct simply cannot be fairly described as part and parcel of an attempt to persuade or convince listeners. Instead, it is merely conduct, designed to harass and

intimidate.[23] Moreover, this conduct is not expressive or symbolic of some message, as is the case with such conduct as flag burning, draft card burning, or wearing a black armband to protest war.[24] In this case, the protesters' crowding and intimidation are not in themselves intended to express any ideas; rather, the protesters' ideas are expressed verbally or in signs or images, none of which are prevented by the injunction. The harassing conduct, by contrast, itself expresses no message other than the unprotected terror and threats. *See, e.g., City of Fargo v. Brennan*, 543 N.W.2d 240 (N.D. 1996) (invading zone of personal privacy and angrily waving arms and hands close to patient was not protected speech).[25]

To the extent the provisions do impact upon expressive conduct which is protected by the First Amendment, or, for that matter, upon "pure" speech, they do so only incidentally to the regulation of the harmful conduct, and very minimally. The protesters may continue to espouse their views to the targeted patients; they may speak, or indeed scream, from a distance of 15 feet; they may picket, carry signs, objects and images, sing, chant, pray, and offer pamphlets or other literature; they may engage in expressive body language; and, finally, two people at a

[23] Threats and terror are not protected by the First Amendment. *See, e.g., Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) ("What is a threat must be distinguished from what is constitutionally protected speech.").

[24] *See Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (wearing black armband to protest U.S. military involvement in Vietnam); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning).

[25] This Court has said that not even all conduct which is *intended* to express an idea can be labeled "speech." *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); *O'Brien*, 391 U.S. at 376. Therefore, where, as here, the conduct itself is not even *intended* to express an idea but only to harass and intimidate, it is even more clearly nonspeech.

time may approach individuals and communicate with them at the closest range. Indeed, the only impact on speech is that the crowds encircling patients and vehicles and blocking access must, with the exception of two individuals, simply step a small distance away.

The provisions of this injunction thus largely regulate non-expressive conduct, with only incidental limitations on expressive conduct or speech. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). This Court has also held that the government has a "freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406 (1989). In both *O'Brien* and *Texas v. Johnson*, the conduct sought to be regulated by the government—draft card or flag burning—while obviously consisting of some nonspeech elements, is also expressive in a very fundamental way. Here, by contrast, the conduct of the protesters sought to be regulated by the injunction provisions at issue, as described above, is hardly expressive in and of itself at all. Under these circumstances, *amici* submit that even in the context of an injunction, this Court's tradition, as exemplified in *O'Brien* and *Texas v. Johnson*, of allowing government a "freer hand" to regulate conduct should result in a more lenient analysis, particularly where the conduct at issue is so largely non-expressive as it is here.

Additionally, a more lenient analysis is called for here because the patients are "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, and are therefore not free to retreat from the protesters without sacrificing their medical well-being. This Court has made clear that the ordinary analysis to be applied when one party's right to speak conflicts with another party's right to be

left alone changes when the latter is a "captive audience." In short, the "captive audience" doctrine requires that when an unwilling listener is unable to escape from a speaker, heightened restrictions on the speaker's expressive activity are appropriate. *See, e.g., Frisby v. Schultz,* 487 U.S. 474, 487-88 (1988). For this reason, then, too, a more lenient First Amendment standard should be applied in this case.

CONCLUSION

For the above-described reasons, and for the other reasons set forth in the Brief for Respondents, this Court should affirm the decision below.

Respectfully submitted,

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